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Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO CASTANEDA et al., Defendants and Appellants.	2d Crim. No. B249571 (Super. Ct. No. 1362689) (Santa Barbara County) OPINION ON REMAND

Roberto Castaneda, Christopher Jaime, and Gregory Wallace appeal after a jury convicted them of first degree murder (Pen. Code,[1] §§ 187, subd. (a), 189) and found true allegations that (1) a principal intentionally discharged a firearm, causing great bodily injury (§§ 12022.7, 12022.53, subds. (d), (e)); (2) the murder was committed for the benefit of a criminal street gang

[1] All statutory references are to the Penal Code unless otherwise stated.

(§ 186.22, subd. (b)(1)); (3) Wallace committed the murder for financial gain and to further the activities of his gang (§ 190.2, subds. (a)(1), (a)(22)); and (4) Castaneda and Jaime were minors of at least 16 years of age when they committed the offense (Welf. & Inst. Code, § 707, subds. (b)(1), (d)(1)). Wallace and Jaime were also convicted of possessing a controlled substance for sale (Health & Saf. Code, § 11378), and Wallace was further convicted of being a felon in possession of a firearm (former § 12021, subd. (a)(1)) and making criminal threats (§ 422). Wallace was sentenced to life without the possibility of parole (LWOP) plus 25 years to life and nine years eight months. Castaneda was sentenced to 50 years to life, and Jaime was sentenced to 50 years to life plus six years.

Appellants contend (1) a mistrial should have been declared following the death of the original presiding judge; (2) the court erred in instructing the jury on the natural and probable consequences theory of first degree murder; (3) a new trial should have been granted due to juror misconduct; and (4) the court erred in imposing restitution fines without considering appellants' ability to pay. Appellants also allege cumulative error and ask us to review the transcript of an in-camera hearing to determine whether a prospective juror was properly excused.

Wallace further contends the court erred in (1) holding a joint trial; (2) ordering him to be physically restrained during trial; (3) denying his motion to dismiss due to interference with his right to counsel; and (4) submitting the financial gain special circumstance allegation to the jury. Castaneda and Jaime also contend the court erred in excluding expert testimony and their sentences amount to cruel and unusual punishment.

In our original opinion, filed August 19, 2015, we affirmed the judgments but ordered that Castaneda and Jaime's sentences be modified to reflect they were both eligible for parole during their 25th year of incarceration, as provided in section 3051, subdivision (b)(3). The Supreme Court granted Castaneda and Jaime's petitions for review on their cruel and unusual punishment claims and deferred further action pending the court's decision in *People v. Franklin*, S217699. After the Supreme Court issued its decision in *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), it transferred this case to our court with directions to vacate our decision and reconsider the cruel and unusual punishment issue in light of *Franklin*. The parties submitted supplemental briefing on the issue.

In light of *Franklin*, we again affirm. Castaneda and Jaime have a meaningful opportunity for release during their 25th year of incarceration, so their claims of cruel and unusual punishment are moot. (*Franklin*, *supra*, 63 Cal.4th at pp. 268, 279-280.) Consistent with *Franklin,* we remand for the trial court to determine whether Castaneda and Jaime were afforded an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings (the Board) at their future eligibility hearings. (*Id.* at p. 284.)

STATEMENT OF FACTS

In January 2010,[2] appellants were members of Lompoc's Westside VLP (VLP), a Sureño gang with allegiance to the Mexican Mafia. VLP paid a portion of its revenue as a "tax" to the Mexican Mafia. If the tax was not paid, the Mexican Mafia would target VLP members for assault or death.

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[2] All unspecified date references are to the year 2010.

Wallace was a high-ranking VLP member authorized to collect "taxes" for the gang. On January 10, Wallace was released from prison and began staying at his girlfriend Sonia Silva's apartment in Lompoc. He met that same day with VLP member Joshua Lemen and VLP associates Danny Sanchez and Phillip Hurt. Wallace said he wanted to "tax" non-gang members who were selling drugs in VLP's territory. Lemen and Sanchez gave Wallace the names of six local drug dealers and told some of the dealers they had to pay a tax to VLP.

On January 14, Wallace asked Lemen and Sanchez to identify "younger homeys out there that were putting in a lot of work" for VLP. Wallace met with Lemen, Sanchez, Castaneda, Jaime, and VLP members Sergio Melgoza, Osvaldo Monroy, Ray Cardoza, and Francisco Vargas.[3] Wallace said Lemen and Sanchez would sell drugs and that the others would act as a "gunning crew" and "really push up on the people [who] were selling drugs and force them to pay taxes."

Isidro "Pollo" Madera was a methamphetamine dealer who lived in Lompoc with his girlfriend Chastity Turner and her daughter. Madera often sold drugs in the alley near Wallace and Silva's apartment. During the week prior to Madera's murder on January 20, Castaneda and Cardoza went to his apartment several times seeking payment of the "tax." Madera either refused to pay or had Turner or her daughter say he was not home.

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[3] Cardoza and Vargas testified for the prosecution pursuant to plea agreements. Cardoza pled guilty to first degree murder and admitted gang and firearm use enhancements in exchange for a commitment to the Department of Juvenile Justice (DJJ) until the age of 23 or 25. Vargas pled guilty to second degree murder and admitted a gang enhancement for a sentence of 15 years to life.

Juan Carlos Astorga lived in an apartment across the alley from Wallace and Silva. Astorga had allowed Madera to sell drugs out of his apartment. A week or so before Madera's murder, Wallace went to Astorga's apartment and demanded that he pay a monthly $100 tax to VLP. Wallace said things would "go really bad" for Astorga and Madera if they did not pay the tax. Wallace said he would try to collect from Madera again and left. Astorga called the police and reported the incident to Detective David Garcia.

On January 18, Wallace met at Silva's apartment with Castaneda, Jaime, Melgoza, Osvaldo Monroy, Lemen, and Sanchez. Wallace was angry and said he wanted them to kill a drug dealer who was refusing to pay taxes. He received two shotguns from Lemen and gave them to Jaime along with a sheet of paper with Madera's address.

The day of Madera's murder, Wallace went to Astorga's apartment and again accused him of selling drugs there. Wallace directed Carlos Correa, who was visiting Astorga, to drive Astorga and Jaime to Madera's apartment. When Astorga and Correa returned, Wallace ordered them to walk with him to his apartment. Castaneda, Jaime, Vargas, Cardoza, and VLP members David Yang and Eric Monroy[4] eventually arrived. Wallace donned a black mask and gloves and told the group to "go over there and finish him off." Wallace said, "This fool thinks I'm playing, if he doesn't pay up, blast him."

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[4] Yang testified for the prosecution. He was 15 years old at the time of the murder. He pled guilty to second degree murder and admitted a gang enhancement in exchange for a DJJ commitment until the age of 23 or 25. Eric Monroy (Monroy), Osvaldo Monroy's brother, disappeared several months after the murder and was still at large at the time of trial.

Castaneda, Jaime, Cardoza, Monroy, Vargas, and Yang got into Vargas's car. Castaneda had a shotgun and Monroy had a shorter shotgun with black electrical tape on the handle. The guns were given to Jaime, who wrapped them in a towel and placed them in the truck. Vargas drove to an alley a block away from Madera's apartment and parked. Wallace, Astorga, and Correa returned to Astorga's apartment.

Cardoza and Yang got out of Vargas's car and went to see if Madera was home. They returned and reported that Madera was in the alley outside his apartment. Jaime called Wallace, who told him they should "blast" Madera if he refused "to pay up." Castaneda and Monroy took their shotguns from the trunk and the group walked toward Madera's apartment. Madera was in the carport fixing a flat tire on his truck. Jaime made a gesture to identify Madera to the others.

Castaneda and Monroy approached Madera. One of them asked Madera in Spanish if he was "Pollo" and Madera replied in Spanish, "Yes, why[?]" Jaime, Cardoza, or Yang said, "Get him." Castaneda and Monroy pulled out their guns and pointed them at Madera. Madera raised his hands and said, "No, no." Castaneda and Monroy fired their guns at Madera. A shotgun blast from Monroy's gun hit Madera in the back and he fell to the ground. Castaneda's gun jammed. Castaneda, Monroy, and Vargas ran back to Vargas's car. Jaime, Cardoza and Yang ran in the opposite direction.

Turner witnessed the shooting as she was returning to the carport from her apartment. The police arrived in response to a 911 call and found Madera lying on the ground and bleeding. He was transported to the hospital and later died from

his injuries. Turner told the police that Cardoza and other VLP members had shot Madera.

Wallace heard the sirens from Astorga's apartment and told Astorga and Correa, "It's done." Wallace left and returned with a scale and methamphetamine, which he placed in several small packages.

Police officers responding to the incident saw Cardoza running nearby and detained him. Yang saw the police detain Cardoza, so he waited at a nearby restaurant before walking home.

Vargas drove to the residence of his friend Alfonso Reyes, who lived across the street from Astorga. Monroy told Reyes that Monroy and Castaneda "just did something" and needed to destroy the evidence. Castaneda and Monroy gave their clothes to Reyes and took showers. Reyes burned the clothing and gave Castaneda and Monroy other clothes to wear.

Monroy removed the guns from Vargas's car. Vargas removed the towel along with a carrying bag for a chair. Monroy wrapped the guns and bag in the towel and put them in an apartment behind Reyes's house. On Wallace's orders, Jamie put the guns in the bag and brought them to Astorga's apartment. Wallace hid the guns in the backyard. Jaime took the packages of drugs Wallace had assembled and left.

While Wallace was still at Astorga's apartment, Detective Garcia called Astorga and told him Madera had been killed. Astorga said told the detective he was okay but did not elaborate because Wallace was there. After Astorga hung up, Wallace told him he would be using his apartment to sell drugs and hid some of the drugs in the backyard. Wallace said Astorga would suffer the same fate as Madera if he did not take care of

the drugs and guns. After Wallace left, Astorga called Detective Garcia and reported what had happened. The detective and another officer went to Astorga's apartment and Astorga showed them where the guns and drugs were hidden. Astorga and his son were escorted to the police station.

Wallace was arrested several hours later at his apartment. When he spoke to Silva by telephone a few hours after his arrest, he said the "old dude" across the street still had his "stuff" and that his "protégé" Jaime knew this "because he was over there with" him. Wallace had similar conversations with Jaime and Silva. The next day, Wallace called Silva and told her to convey to Jaime that the police were asking questions and to tell everyone to keep quiet. Several days later, Silva told Jaime, Vargas, and Melgoza that Wallace wanted them to recover the guns from Astorga's apartment. Jaime, Vargas, and Melgoza ransacked the apartment in an effort to find the guns, not knowing that the police had already confiscated them.

Lompoc Police Department Agent Scott Casey testified as the prosecution's gang expert. Agent Casey testified about VLP's pattern of criminal activity and identified the predicate crimes committed by its members. Based on his review of the reports in the case and the trial testimony, Agent Casey opined that VLP would benefit from killing a drug dealer who refused to pay taxes to the gang. When presented with a hypothetical tracking the facts of the case, the agent opined that Madera's murder was committed for VLP's benefit.

Jaime did not present any evidence in his defense. Castaneda offered the testimony of a private investigator who interviewed Turner four times. Turner told the investigator that the individuals who shot Madera were two older men. She also

said the men were bigger than the two teenagers (one of whom was Castaneda) who came to the apartment looking for Madera.

Wallace offered several witnesses who testified to Astorga's reputation for dishonesty and untrustworthiness. Astorga's stepdaughter testified that he had molested her as a child. Wallace also called a gang expert who opined it was doubtful that a VLP member who had just gotten out of prison would be given the power to make gang-related decisions. The expert also expressed doubt that someone with a leadership position in the gang would plan a murder while non-gang members were present. He further questioned whether a gang would sanction the killing of a "nickel and dime drug runner" and give him so little time to pay before carrying out the crime.

DISCUSSION

I.

Joint Trial

Wallace contends the court erred in ordering that he be tried jointly with Castaneda and Jaime. We disagree.

Section 1098 provides in pertinent part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials." The court may order separate trials "'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.' [Citations.]" (*People v. Avila* (2006) 38 Cal.4th 491, 574–575 (*Avila*).) "Under Penal Code section 1098, a trial court *must* order a joint trial as the 'rule' and *may*

order separate trials only as an 'exception.' [Citation.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 190.)

We review the trial court's refusal to order separate trials for an abuse of discretion based on the facts as they appeared at the time of the ruling. (*Avila, supra*, 38 Cal.4th at p. 575.) If this ruling was proper at the time it was made, we may reverse only if the record shows that a joint trial "'resulted in "gross unfairness" amounting to a denial of due process.' [Citation.]" (*Ibid.*) "Even if the court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, defendant would have received a more favorable result in a separate trial. [Citation.]" (*Ibid.*)

Cardoza and Lemen were originally charged with murder along with appellants. Over the prosecution's objection, the court ordered that Cardoza, Castaneda, and Jaime be tried separately from Lemen and Wallace, who was then acting as his own attorney. After Cardoza and Lemen entered plea agreements and Wallace was no longer representing himself, the court granted the prosecution's motion to try appellants jointly. The court explained: "Originally, the Court was concerned as to a pro per Defendant and the three juveniles at the time that it would be difficult to conduct a hearing and to maintain order and to present a fair trial. Things are different now. Mr. Wallace is represented by counsel. We are down to three defendants. I think it is a manageable trial. So consolidation will occur."

Wallace later moved in limine for the court to either limit accomplice testimony or sever his trial from Castaneda and Jaime's trial. The court concluded that any issues regarding Wallace's confrontation rights could be dealt with through limiting instructions and declined to order severance.

Wallace claims that he should have been tried separately because there was a "danger" he "would be demonized, much like Fagan, who held sway over the vulnerable and impressionable child-criminals under his control in the novel Oliver Twist." He also asserts that the two special circumstance allegations, which only applied to him, may have given jurors "the impression that [he] had a greater stake in the murder of Madera than did his co-defendants." Finally, he notes that he was the only defendant in restraints.

None of these assertions is persuasive. Any prejudicial analogy to "Fagan" or "impression that [Wallace] had a greater stake in the murder" arises from the evidence, which would have been the same had Wallace been tried separately. In a similar vein, any prejudice arising from Wallace's restraints was primarily due to the restraints themselves, which had nothing to do with the fact he was tried jointly with his codefendants. Any additional prejudice he may have suffered as a result of his codefendants' presence was not enough to amount to a denial of his due process rights.

Even if Wallace could establish that the court's failure to order a separate trial was an abuse of discretion, he fails to demonstrate a reasonable probability that he would have achieved a more favorable result but for the error. (*Avila, supra*, 38 Cal.4th at p. 575.) The evidence of his guilt was overwhelming. Any error in trying him jointly with Castaneda and Jaime was harmless.

II.

Allowing Trial to Proceed Following Judge Bullard's Death

Santa Barbara County Superior Court Judge Edward H. Bullard was assigned to preside over appellants' trial. On

March 6, 2013, after 15 days of testimony and near the end of the prosecution's case-in-chief, trial was recessed until the following week. Tragically, Judge Bullard died on Sunday, March 10th. The following day, Judge Rick S. Brown was assigned to replace Judge Bullard. Appellants contend that allowing the trial to proceed under Judge Brown violated their state and federal rights to due process and a fair trial. We conclude otherwise.

Judge Brown was assigned to the case pursuant to section 1053, which provides in pertinent part: "If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at the trial shall die, become ill, or for any other reason be unable to proceed with the trial, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial . . . . The judge or justice authorized by this section to proceed with and complete the trial shall have the same power, authority, and jurisdiction as if the trial had been commenced before that judge or justice."

When the parties were informed of Judge Brown's assignment, Wallace moved for a mistrial and Jaime joined in the motion. Castaneda wanted the trial to proceed under Judge Brown. Judge Brown declined to grant a mistrial, but later ordered a recess to give him time to review the transcripts and familiarize himself with the case. The parties were invited to submit trial summaries to further educate him about the evidence that had thus far been presented.

After the recess, Wallace moved to strike the prosecution's summaries as argumentative and prejudicial. Wallace alternatively urged Judge Brown to grant a mistrial if he had already read the summaries. The judge denied the motion in both respects and stated, "I think nothing in these documents

that I looked at would be prejudicial in light of the fact that I was also able to look at the transcripts as well. These papers merely help the court get an introduction, shall we say, to the case and to decide exactly how to proceed."

Judge Brown explained: "For the record, the procedure followed by the court was to obtain a copy of all of the minutes in the case, and I preceded [*sic*] through the minutes from day one through the end of the trial until I took over. I even looked at each witness and highlighted what they said, the various rulings made by Judge Bullard. I noted what rules he had ruled on and decided, in other words, what's been taken care of. I tried to note to the best of my ability what remains to be decided by this judge. I did not view the summaries as arguments particularly, I was just looking for the nature of the testimony." The judge said he "thumb[ed] through" the trial transcript and added, "[t]he law doesn't require . . . that a judge in the situation I'm in right now coming in the middle of the trial have read the whole transcript. What it does require is the judge be prepared when it makes a ruling as it goes through the trial to be sure it is prepared to do so by looking at the transcript."

At the conclusion of the prosecution's case-in-chief, appellants moved for judgments of acquittal under section 1118.1. Judge Brown denied the motions. After appellants were convicted, Wallace and Jaime each filed motions for a new trial. Castaneda subsequently joined in Jaime's motion. The motions alleged among other things that a mistrial should have been granted following Judge Bullard's death. The only contention related to the sufficiency of the evidence was Jaime's claim that the evidence was insufficient to prove he had the requisite mental state for first degree murder. Judge Brown denied both motions.

Judge Brown did not err in proceeding with the trial following Judge Bullard's death.[5] Appellants' assertion to the contrary is based on the fact that Judge Brown did not have the opportunity to observe the witnesses who testified prior to Judge Bullard's death. Because the judge did not observe these witnesses, appellants claim he could not properly fulfill his role as the "13th juror" in ruling on their motions for a new trial under section 1181. In so arguing, appellants ignore the cases that have considered and rejected this very claim. (*People v. Moreda* (2004) 118 Cal.App.4th 507, 511-518; *People v. Holzer* (1972) 25 Cal.App.3d 456, 464, disapproved on another ground in *People v. Palmer* (2001) 24 Cal.4th 856, 867; see also *People v. Allison* (1989) 48 Cal.3d 879, 916 [citing *Holzer* with approval in recognizing it is "settled" that on remand for redetermination of a new trial motion, "if the trial judge is unavailable, the motion is properly redetermined by another judge of the court"]; *People v. Cowan* (2010) 50 Cal.4th 401, 459 [citing *Moreda* with approval].)

As these cases recognize, "section 1181 does not confer on the criminal defendant the right to have a new trial motion decided by the judge who presided at trial. A judge who did not preside at trial can perform its supervisory function under section 1181 by independently reviewing the trial record in order to determine whether the evidence supports the verdict." (*People v. Moreda, supra*, 118 Cal.App.4th at p. 515.) Even if it were otherwise, the error would be harmless. Castaneda and Wallace did not allege insufficient evidence in moving for a new trial under section 1181, and Jaime merely claimed the evidence

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[5] Castaneda forfeited his claim by urging Judge Brown to proceed with the trial. Although he joined in Wallace's second mistrial motion, that motion challenged the judge's review of the prosecution's trial summaries rather than his decision to proceed.

was insufficient to support the finding he had the requisite mental state to commit first degree murder. Moreover, the evidence of appellants' guilt was overwhelming. Accordingly, any error in denying appellants' motions for a mistrial or a new trial was harmless under any standard of review. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

III.

Wallace's Physical Restraints

Wallace was physically restrained during part of the pretrial proceedings and throughout the trial. In addition to being handcuffed and shackled, his handcuffs were secured with a lockbox and attached to a chain that was connected to the floor. To prevent the jury from seeing the restraints, Wallace was seated before the jury entered and black curtains were placed around counsel's table. Defense counsel sat next to Wallace and the parties remained seated when the jury entered and exited the courtroom. When Wallace wore a jacket and placed his hands in his lap, the restraints were not visible to the jury.

On at least one occasion, Wallace refused to wear a jacket and the restraints were visible to the jury. He did not ask the court to give CALCRIM No. 204.[6]

In moving for a new trial, Wallace claimed that the restraints violated his right to a fair trial. The motion was supported by a declaration from the jury foreperson stating that

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[6] CALCRIM No. 204 states: "The fact that physical restraints have been placed on [a defendant] is not evidence. Do not speculate about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations."

he had seen the restraints on a day when Wallace was not wearing a jacket. Another juror also mentioned seeing the restraints, but the "issue was not discussed any further by [him] or any other juror in [his] presence." The foreperson made clear that the restraints "did not enter into jury deliberations in any way." Wallace also asked the court to disclose the jurors' personal identifying information and hold a hearing to determine whether any of the jurors were biased against him as a result of having seen the restraints. The court denied the request and declined to order a new trial, reasoning that the issue was one for appeal. The court further found that Wallace had not been prejudiced by the jurors' brief observation of the restraints and that the restraints had not interfered with his right to counsel.

Wallace contends that the record does not demonstrate a manifest need for his restraints as contemplated in *People v. Duran* (1976) 16 Cal.3d 282 (*Duran*), and its progeny. He further claims that the error was prejudicial because (1) the record reflects that at least two jurors actually saw the restraints; and (2) the restraints "prevented him from communicating effectively with trial counsel during trial."[7]

Wallace's claim is premised on the erroneous assertion that a defendant cannot be restrained in court unless his conduct *in court* supports finding of manifest need. Rather, "'it is the defendant's conduct in *custody*, now or at other times,

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[7] We reject the People's contention that Wallace forfeited the right to challenge anything other than the restraint of his right hand. The cases the People offer in support of their claim involve defendants who, unlike Wallace, did not object to their restraints after there had been a compromise or court ruling limiting the restraints. (*People v. Manibusan* (2013) 58 Cal.4th 40, 85; *People v. McWhorter* (2009) 47 Cal.4th 318, 375; *People v. Alvarez, supra,* 14 Cal.4th at p. 192, fn. 7.)

or his expressed intention to escape or engage in nonconforming conduct during the trial that should be considered in determining whether there is a "manifest need" for shackles.' [Citations.]" (*People v. Allen* (1986) 42 Cal.3d 1222, 1263.)

Wallace downplays the evidence supporting the court's finding that his statements and conduct demonstrated a manifest need for his restraints. That evidence—which included an assault on an officer, a threat to kill his attorney, and numerous weapon possessions—led the court to find Wallace was "extremely dangerous," "disruptive to the[] proceedings," and "disruptive to the jail." Wallace makes no meaningful effort to challenge these findings, which are also fatal to his claim that less restrictive restraints would have been sufficient.

In any event, Wallace knew the restraints would not have been seen but for his willful refusal to wear a jacket. The court made every effort to ensure the restraints were not visible to the jury, and Wallace is solely responsible for the failure of those efforts. He also declined to request CALCRIM No. 204. He thus cannot be heard to complain that jurors actually saw his restraints. (*People v. Seaton* (2001) 26 Cal.4th 598, 652.)

Wallace also fails to demonstrate the court erred in refusing to disclose the jurors' personal identifying information based on the foreperson's statement that Wallace's restraints were visible, or in refusing to hold a hearing on the related claim of juror misconduct. Both rulings are reviewed for an abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317 [refusal to disclose jurors' identifying information]; *People v. Dykes* (2009) 46 Cal.4th 731, 810 [denial of request for evidentiary hearing].)

There was no abuse of discretion here. This is not a case in which restraints were not supported by a prior showing of

manifest need. (Compare, e.g., *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1830-1831, and cases cited therein.) The restraints were only visible due to Wallace's deliberate conduct, and he declined to request CALCRIM No. 204. Moreover, his proffered evidence indicated that only two of the jurors had reported seeing the restraints on a single day and that it played no part in the jury's deliberations. (See *Duran, supra*, 16 Cal.3d at p. 287, fn. 2, citations omitted [jurors' "brief observations" of defendant in shackles inside of courtroom "have generally been recognized as not constituting prejudicial error"].)

The court also properly found that Wallace's in-court restraints did not impermissibly interfere with his right to counsel. The court expressly found that Wallace's restraints did not prevent him from writing or otherwise communicating with counsel, and Wallace offers no evidence to the contrary.

IV.

Jail Staff's Alleged Interference with Wallace's Right to Counsel

In 2005, Wallace was convicted of committing battery against a custodial officer (§ 243.1) and sentenced to 16 months in prison. During incarcerations in 2006 and 2007, he participated in assaults on other inmates. In 2009, he was extracted from his cell and disciplined for inciting a major disturbance during which a deputy was assaulted. Since his arrest in January 2010, he had assaulted a deputy, threatened another deputy, instigated a violent fight in which another inmate was slashed with a razor, and was found in possession of a metal rod and several razor blades.

In addition to Wallace's history of violence while in custody and the recent incidents of violent and threatening behavior, he threatened to kill his attorney. Less than 10 days

prior to that threat, jail staff found Wallace in possession of a dagger. It is against this backdrop that the court granted the sheriff's request that Wallace be denied any direct contact visits. He was instead allowed "professional visit[s]," which take place in booths in which the inmate and visitor are separated by plexiglass and speak to each other on telephones. Wallace's subsequent requests for contact visits were denied.

Wallace argues that jail staff violated his right to counsel by refusing to allow him to have contact visits with his attorney and requiring them to meet in an environment in which confidentiality might be compromised. In so arguing, he again gives short shrift to the evidence of his dangerous and disruptive behavior. Although he had a constitutional right to consult privately with his counsel outside the presence of others who might overhear them (see, e.g., *In re Qualls* (1943) 58 Cal.App.2d 330), he merely speculates that his visits with counsel in the jail's professional visitation booths could be overheard. (See *People v. Ervine* (2009) 47 Cal.4th 745, 769, citation omitted ["[A] defendant's inability to consult with counsel or to assist in his defense must appear in the record"].) He also fails to acknowledge that an inmate can be denied contact visits with counsel for security purposes and that such a restriction is appropriate where, as here, the inmate has demonstrated a propensity toward violence. (*Department of Corrections v. Superior Court* (1982) 131 Cal.App.3d 245, 253-254.) He further fails to show that a reasonable and less restrictive alternative was available. (*Id.* at pp. 254-255.)

Wallace also contends that jail staff violated his right to counsel by opening, reading, and disseminating his confidential legal mail. He claims that jail staff engaged in

"egregious and persistent interference" with his legal mail, yet only one instance of impropriety was found to be substantiated. In that incident, a packet was opened outside his presence. Although the packet was not clearly identified as legal mail, it bore the name and address of Wallace's appointed counsel. One of the documents in the packet was a transcription of Wallace's timeline of the events and his assertions regarding the conduct of certain custodial officers, apparently including Senior Custody Deputy (now Sergeant) Rick Zepf. Purportedly due to security concerns, Senior Custody Deputy Jackie Dominick forwarded the document to Sergeant Zepf as an attachment to an email. For reasons that are unclear, Sergeant Zepf then forwarded the document by email to several other custodial officers as well as the prosecutor assigned to the case. The prosecutor refrained from reading the document and promptly notified the court and defense counsel of the situation.

Wallace moved for a dismissal, arguing that the opening and dissemination of his confidential legal mail was a constitutional violation worthy of that sanction. In its ruling, the court noted "[t]his is a case where there has been some unusual events dealing with the legal mail, weapons in the legal mail and security issues at the jail, and so it is very difficult to run with the normal rules and regulations when you have individuals that are in all intents and purposes trying to usurp the privilege of legal mail and their status in the jail and the requirements, and we discussed that and tried to deal with it on numerous occasions in this court." The court found, however, that jail staff should have realized the documents in the packet were legal mail and that Sergeant Zepf should have known not to disseminate them to anyone. The court declined to order a dismissal and instead

ruled that if Sergeant Zepf were to testify, the jury would be instructed that what he had done was improper and could be considered in evaluating his credibility.

Wallace fails to demonstrate a dismissal was warranted. He makes no mention of the numerous times he abused his pro per privileges, or how it may have created confusion among jail staff regarding his legal mail. Moreover, the court was free to reject his claims that his legal mail was mishandled on other occasions. (See *People v. Cuevas* (1967) 250 Cal.App.2d 901, 907 ["One of the powers of the trial court is to disbelieve allegations in the declarations, even though they are not controverted"].) No confidential communication was actually read by the prosecutor, so there was no Sixth Amendment violation. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 558.) In addition, nothing jail staff did or did not do bears on the validity of Wallace's conviction, which is supported by overwhelming evidence. His motion to dismiss was properly denied.

V.

Proposed Expert Testimony on Adolescent Brain Development

Castaneda and Jaime contend the court erred in precluding them from presenting expert testimony regarding adolescent brain development and its effect on an adolescent's ability to form the requisite mental state to commit the charged murder. We disagree.

Expert testimony is admissible if it relates to a subject "sufficiently beyond common experience" so that the expert's opinion "would assist the trier of fact." (Evid. Code, § 801, subd. (a); *People v. Prince* (2007) 40 Cal.4th 1179, 1222.) It is not admissible if it relates to a subject "' . . . of such common knowledge that men [and women] of ordinary education could

reach a conclusion as intelligently as the witness . . . .'" (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1226-1227.) The testimony must also be relevant. (*People v. Williams* (2008) 43 Cal.4th 584, 633.) A trial court's exclusion of expert testimony will not be disturbed on appeal absent a manifest abuse of discretion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.)

Prior to trial, Jaime informed the prosecution that he intended to call Dr. Adriana Galvan, a developmental psychologist, to testify regarding the brain development of adolescents and its effect on their behavior and decision-making ability. The prosecution was also informed that Dr. Galvan's testimony would relate to adolescents in general and that she would not be evaluating Jaime. The prosecution moved in limine to exclude the testimony as both irrelevant and prohibited under sections, 26, 28, and 29. Jaime opposed the motion and Castaneda and Wallace joined in the opposition. The court tentatively ruled that Dr. Galvan would not be permitted to testify at trial because her proposed testimony was only relevant to sentencing, not guilt. The court added, "I don't think there is anything that deals with a general science that would be acceptable for the court to allow as to juveniles not being able to formulate specific intent." The court emphasized that its ruling was tentative and invited the parties to raise the issue again during their cases-in-chief.

Jaime subsequently moved for Dr. Galvan to testify. Neither Castaneda nor Wallace joined in the motion. In support of his motion, Jaime attached Dr. Galvan's unsworn declaration opining "that all of [Jaime's] decisions, impulses and behavior was [*sic*] governed by an immature brain." The doctor based her opinion on her expert knowledge of "the developing juvenile brain

and adolescent behavior" and her review of Jaime's school record, which demonstrated he was "an impulsive, defiant and reactive adolescent, prior to the incident." The court denied Jaime's motion and reiterated its conclusion that such testimony was not admissible during the guilt phase of the trial.

After appellants were convicted, Jaime moved for a new trial alleging that the court had prejudicially erred in excluding Dr. Galvan's testimony. Castaneda joined in the motion. The court denied the motion, yet reiterated that it would consider Dr. Galvan's declaration for purposes of sentencing.

Although Castaneda joined in Jaime's opposition to the prosecution's in limine motion to exclude Dr. Galvan's testimony, the court's ruling on the motion was tentative. Castaneda did not move during trial to admit the testimony or join in Jaime's motion, so he forfeited the right to claim on appeal that the evidence was erroneously excluded. (*People v. Holloway* (2004) 33 Cal.4th 96, 133 [a defendant cannot challenge a tentative pretrial evidentiary ruling on appeal "if [he or she] could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself"]; *People v. Wilson* (2008) 44 Cal.4th 758, 793 [defendant forfeits issue on appeal by failing to join in codefendant's objection or motion].)

Moreover, the court did not abuse its discretion in excluding the proposed testimony. Evidence of a mental disease, mental defect, or mental disorder may be admissible to show whether a defendant actually formed a mental state required for a charged offense, but evidence concerning whether a defendant had the capacity to form such a mental state is not admissible at the guilt phase of a trial. (*People v. Coddington* (2000) 23 Cal.4th

529, 582, overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

In addition, the standard applied in deciding whether a defendant is guilty of murder addresses whether his actions were those of a reasonable person, not the actions of a reasonable juvenile. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 136-137; CALCRIM No. 580.) As the People note, "[b]eing a teenager is not a 'mental disease, mental defect, or mental disorder.'" Section 26 makes clear that there is no separate standard for a juvenile who is lawfully tried as an adult. The cases Castaneda and Jaime cite regarding evidence of a defendant's mental disease, defect, or disorder (e.g., *People v. Cortes* (2011) 192 Cal.App.4th 873; *People v. Coddington, supra,* 23 Cal.4th at pp. 582-583; *People v. Nunn* (1996) 50 Cal.App.4th 1357; *People v. Young* (1987) 189 Cal.App.3d 891) are thus inapposite.

Dr. Galvan's proposed testimony also failed to relate to a subject beyond common experience. It is commonly understood that "'[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' [Citations.]" (*Roper v. Simmons* (2005) 543 U.S. 551, 569.) It is also generally known "that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." (*Ibid.*) The common knowledge and related evidence that adolescents are different from adults in this regard is only relevant for purposes of sentencing. (*Miller v. Alabama* (2012) 567 U.S. — [132 S.Ct. 2455, 2464] (*Miller*).) Castaneda and Jaime's reliance on recent

cases acknowledging this difference and legislation enacted as a result of those decisions is misplaced.[8]

Even if the evidence was erroneously excluded, the error would be harmless. As we have noted, it is common knowledge that juveniles act more impulsively than adults and are more susceptible to peer pressure. Castaneda and Jaime note that two jurors cried and expressed their discomfort in convicting them of murder. The jurors nevertheless voted to convict, and reiterated their votes after several more hours of deliberation. Moreover, they were properly reminded that the defendants' ages should not influence their decisions. (CALCRIM No. 200.)

The evidence that Castaneda and Jaime acted with the requisite intent to commit first degree murder was also overwhelming. There were no indications of rash or impulsive behavior in their commission of this calculated crime. They were not pressured into participating and showed no signs of remorse or regret. Jaime played a primary role in the crime and conveyed Wallace's command that Madera be killed. After the order was carried out, Castaneda gloated that the "fool[]" was dead and expressed his excitement that his participation had earned him entry into one of VLP's cliques. In light of the evidence, no reasonable juror would have found that Castaneda and Jaime's adolescent brains had prevented them from forming the specific intent to commit first degree murder. Accordingly, any error in excluding Dr. Galvan's testimony was harmless. (*Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman*, *supra*, 386 U.S. at p. 24.)

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[8] Castaneda and Jaime's reliance on *People v. Humphrey* (1996) 13 Cal.4th 1073, is also unavailing. That case involved evidence on battered wife syndrome, which is admissible under Evidence Code section 1107. (*Id.* at pp. 1076-1077.) Neither the Legislature nor the electorate has enacted a similar law providing for the admissibility of the evidence at issue here.

VI.

Natural and Probable Consequences - First Degree Murder

After appellants were convicted, our Supreme Court held that an aider and abettor cannot be convicted of "first degree *premeditated* murder under the natural and probable consequences doctrine." (*People v. Chiu* (2014) 59 Cal.4th 155, 158-159 (*Chiu*).) Appellants contend the court instructed the jury on this erroneous theory and that the error compels reversal of their first degree murder convictions. The People concede error but deem it harmless. We reject the People's concession.

In *Chiu*, the jury was instructed pursuant to CALCRIM No. 403 that the defendant could be found guilty of murder under the natural and probable consequences theory if he (1) committed a target offense (assault or disturbing the peace); (2) as a coparticipant committed murder during commission of the target offense; and (3) as a reasonable person in the defendant's position would have known the murder was a natural and probable consequence of either target offense. If the jury found the defendant guilty of murder on this theory, it then had to decide whether the crime was in the first or second degree. Specifically, the jury was instructed under CALCRIM No. 521 that the defendant was guilty of first degree murder if the prosecution proved that the *perpetrator* of the murder acted willfully, deliberately, and with premeditation; otherwise, the murder was of the second degree. (*Chiu*, *supra*, 59 Cal.4th at pp. 160-161.)

In reversing the defendant's conviction of first degree murder, the Supreme Court "h[e]ld that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally,

probably, and foreseeably result in a murder under the natural and probable consequences doctrine. We further hold that where *the direct perpetrator* is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine." (*Chiu*, *supra*, 59 Cal.4th at p. 166, italics added.) Accordingly, the instructional error "affect[ed] only the degree of the crime of which defendant was convicted." (*Id.* at p. 168.) The court also recognized that its holding "does not affect or limit an aider and abettor's liability for first degree felony murder under section 189" and that "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles." (*Id.* at p. 166.)

Here, unlike in *Chiu*, the jury was not instructed that appellants could be found guilty of first degree murder under the natural and probable consequences doctrine if the *perpetrator* acted with the requisite intent to kill. Although they were instructed that appellants could be found guilty of *murder* on that theory, the separate instructions addressing whether the murder was of the first or second degree (CALCRIM No. 521) provided that "[a] defendant is guilty of first degree murder if the People have proved that *he* acted willfully, deliberately, and with premeditation." (Italics added.) The instructions went on to explain "[t]he defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant *acted with premeditation* if he decided to kill before completing the act that caused death." (*Ibid.*) Finally, the instructions stated that "[i]f

any juror is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror must give defendant the benefit of that doubt and find that the murder is of the second degree." (*Ibid*.)

As these instructions make clear, appellants could be found guilty of first degree murder only if they intended to kill Madera and acted with premeditation. The jury thus convicted them under direct aiding and abetting principles, a theory that is still valid. (*Chiu*, *supra*, 59 Cal.4th at p. 167.) Although the prosecutor briefly argued that appellants could be convicted of first degree murder under the natural and probable consequences doctrine, the jury was instructed that counsels' arguments were not evidence and to disregard any statements that conflicted with the instructions. (CALCRIM No. 222.) We presume the jury understood and followed these instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 714.)

VII.

Financial Gain Special Circumstance Allegation (§ 190.2, subd. (a)(1))

Wallace contends the special circumstance allegation that he murdered Madera for financial gain (§ 190.2, subd. (a)(1)) was erroneously submitted to the jury. He claims the allegation did not apply to the facts of the case and "overlapped" with the allegation that he murdered Madera to further the activities of his gang (§ 190.2, subd. (a)(22)). We are not persuaded.

The financial gain special circumstance allegation applies to murders that are "intentional and carried out for financial gain." (§ 190.2, subd. (a)(1).) The prosecutor argued that the allegation was true because the murder was intended

"[t]o send a message to the other drug dealers in Lompoc that they better pay." Wallace asserts "[i]t is unclear from the prosecutor's argument and the facts in the record how [Wallace] would personally financially gain from killing Madera, as Madera was to be killed if he did *not* pay taxes. The gang-benefit ascribed to the killing — 'sending a message' to other gang members in the hope that they would pay taxes to the gang in the future — clearly overlaps with the financial gain motive for the crime."

The prosecution did not have to prove Wallace sought a personal financial benefit. (*People v. Michaels* (2002) 28 Cal.4th 486, 520 (*Michaels*) [financial gain special circumstance allegation applied to defendant who committed murder for the financial gain of a third person].) Moreover, the fact that the same argument supported a true finding on the gang special circumstance allegation (§ 190.2, subd. (a)(22)) does not compel a conclusion that the two allegations impermissibly "overlapped." Wallace's argument to the contrary is based on *People v. Bigelow* (1984) 37 Cal.3d 731 (*Bigelow*). In *Bigelow*, the court held that when felony murder special circumstance is an allegation under subdivision (a)(17) of section 190.2, a financial gain special circumstance can also be alleged only if the victim's death was "the consideration for, or an essential prerequisite to, the financial gain sought by the defendant." (*Id.* at pp. 750-751.)

Even assuming that *Bigelow* applies in this context, it is clear that Madera's murder was an essential prerequisite to the financial gain Wallace sought. Moreover, the Supreme Court has subsequently clarified that *Bigelow* was not intended to "entirely eliminate any possibility of overlapping special circumstances." (*People v. Ervine, supra,* 47 Cal.4th at p. 790.) In *Ervine*, the court rejected the defendant's claim that *Bigelow*

compelled a finding that a special circumstance of murder to avoid arrest (§ 190.2, subd. (a)(5)) had to be stricken because it overlaps with a special circumstance of murder of a peace officer in the performance of his duties (*id.* subd. (a)(7)). In doing so, the court recognized that "[u]nlike the overlap between the robbery-murder special circumstance and the financial-gain special circumstance, where the latter is invariably the motive for the former—or the overlap between 'virtually all' felony-murder special circumstances and a broad reading of the avoiding-arrest special circumstance [citation]—the special circumstances at issue here can (and often do) apply independently." (*Ervine,* at p. 791.) The court further recognized that the special circumstances at issue in the case "protect distinct societal interests." (*Ibid.*)

The same is true here. Gang members who commit murder do not always do so for financial gain. The jury could have found that Wallace murdered Madera not only for the financial benefit of his gang, but also for the purpose of instilling fear in the community. Moreover, the financial gain special circumstance protects society from those who kill for financial gain (*Michaels, supra*, 28 Cal.4th at p. 519), while the gang special circumstance is intended to protect society from gang members who commit murder pursuant to any gang-related activity (*People v. Shabazz* (2006) 38 Cal.4th 55, 66). Accordingly, both allegations were properly submitted to the jury.

VIII.

Jury Foreperson's Reference to a Bible Passage During Deliberations

In moving for a new trial, appellants alleged that the jury foreperson committed misconduct by referring to a passage

from the Bible during deliberations. Appellants also petitioned for access to the jurors' personal identifying information and asked the court to hold an evidentiary hearing on the matter. The court denied the motions without a hearing and declined to disclose the jurors' identifying information. Appellants contend this was error. We disagree.

In support of the claim of jury misconduct, Jaime's investigator submitted a declaration stating: "[The jury foreperson] told me that two female jurors were crying because they found it difficult to convict the two younger defendants in part because they were so young. He took it upon himself to tell the jury a story from the Bible in order to convince the members to find Christopher Jaime and Robert Castaneda guilty. He began something like, 'I do not know if you believe in the Bible but even God held children accountable for their actions and punished children.' He then gave the jurors an example and discussed the story of Elijah where he explained God punished children for making fun of the prophet Elijah because he was bald. As a result of the children making fun of the prophet the Juror reported to the others, God had the children killed. He referenced 2 Kings:23-24 and said to the other jurors, if God is willing to punish children for their actions Christopher and Roberto too should be held accountable."

In opposing the motions, the prosecution offered another declaration from the jury foreperson stating that the two jurors became emotional *after* they had voted along with the rest of the jury to convict both Castaneda and Jaime of first degree murder. When asked why they were upset, the jurors said they were "troubl[ed]" by Castaneda and Jaime's ages. Another juror reread CALCRIM No. 200, which admonished the jurors to not

allow the defendants' ages to influence their decisions. At that point, the foreperson "offered an anecdote from the Bible about God holding children accountable for their bad behavior." The foreperson continued: "I did not cite a chapter and verse. The Bible anecdote took less than a minute to tell. My anecdote did not trigger any discussion in the deliberation room. No other references to the Bible or Biblical stories were made by me or any other juror. The jury deliberation process continued on for several hours. We took two additional votes to give all the jurors an opportunity to change their minds if they wished. However, each time the vote was unanimous for conviction."

The court did not err in denying appellants' motion for a new trial on the ground of jury misconduct, or in refusing to hold an evidentiary hearing on the motion or disclose the jurors' personal identifying information. The court noted that the foreperson did not bring a Bible into the jury room and made the reference after the jury had voted unanimously to convict. The court thus correctly found that no substantial likelihood of juror bias arose from the remarks. The court explained that "instead of quoting Socrates or Plato, or anyone else, he happened to mention the Bible. But he did not represent it as a commandment of God to do a certain thing or to punish them in a certain way, and that's the distinction this case makes . . . ."

Even if the jury foreperson's recounting of a Bible story was misconduct, the court correctly found that appellants suffered no prejudice. "[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in

two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.]" (*In re Carpenter* (1995) 9 Cal.4th 634, 653.)

The court did not err in finding no substantial likelihood of bias. (See *People v. Williams* (2006) 40 Cal.4th 287, 330-336 [no likelihood of bias shown where juror brought copies of Bible pages into the jury room during the penalty phase and read them aloud]; *People v. Danks* (2004) 32 Cal.4th 269, 308 [same].) Although the comments did not arise during a penalty phase, they were made after the jury had unanimously voted to convict appellants. Moreover, the story recounted by the foreperson merely reinforced the instruction that the jury could not consider the defendants' ages in determining their guilt or innocence. (See, e.g., *Williams*, at p. 335 [juror did not commit prejudicial misconduct by reading Bible verses that "merely counseled deference to governmental authority and affirmed the validity of sitting in judgment of one's fellow human beings according to the law"].) There is thus no basis to conclude the comments reflected or created a likelihood of bias. Because the claimed misconduct is not likely to have improperly influenced the verdict, appellants also failed to show good cause for disclosure of the jurors' personal identifying information. (Evid. Code, § 1150, subd. (a); *People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.) The court did not abuse its discretion in declining to hold an evidentiary hearing because there were no material disputed issues of fact. (*People v. Hedgecock* (1990)

51 Cal.3d 395, 419.) Any inconsistencies between the two declarations before the court were not material to its ruling.

IX.

Cumulative Error

Appellants contend the cumulative effect of the errors at trial combined to deprive them of a fair trial. Because we reject each assignment of error, appellants' claim of cumulative error necessarily fails. (*Avila, supra*, 38 Cal.4th at p. 608.)

X.

Cruel and Unusual Punishment

In their opening briefs, Castaneda and Jaime—who were both 16 years old when Madera was murdered—contended that their sentences of 50 years to life (Castaneda) and 50 years to life plus 6 years (Jaime) amount to cruel and unusual punishment. They claimed that their sentences are the functional equivalent of LWOP sentences and the court erroneously imposed them without considering the factors set forth in *Miller*, *supra*, 132 S.Ct. at p. 2464. In *Miller*, the United States Supreme Court held that the Eighth Amendment prohibits the imposition of a mandatory LWOP sentence for a juvenile who commits murder. The court also set forth the factors that must be considered in determining whether such a sentence is warranted. (*Id.* at p. 2468.)[9]

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9 "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct

Miller was decided before Castaneda and Jaime were sentenced. In moving for a new trial, Castaneda and Jaime asked the court to refrain from imposing the 25-year enhancement under section 12022.53 on the ground that doing so would amount to cruel and unusual punishment. In rejecting this claim, the court relied on a pre-*Miller* case, *People v. Em* (2009) 171 Cal.App.4th 964, which held that a sentence of 50 years to life for a juvenile convicted of murder was not cruel and unusual punishment. (*Em*, at pp. 972-977.) The court made no reference to *Miller* or the factors enunciated therein.

Castaneda and Jaime contended in their opening briefs that the court was required to address the *Miller* factors because their sentences are the equivalent of LWOP sentences. The People did not challenge the assertion that the sentences, when imposed, amounted to LWOP sentences. They claimed, however, that the court appropriately considered the *Miller* factors and that section 3051, which was enacted after Castaneda and Jaime were sentenced pursuant to Senate Bill No. 260, effectively renders their sentences neither cruel nor unusual.

In our prior opinion, we concluded that Castaneda and Jaime's claims of cruel and unusual punishment had been rendered moot by the enactment of section 3051. Subdivision (b)(3) of section 3051 states, "A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the

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and the way familial and peer pressures may have affected him. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Id.* at p. 2468.)

board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." That hearing must provide a "meaningful opportunity for release." (§ 3051, subd. (e).) Because Castaneda and Jaime were both sentenced to consecutive sentences of 25 years to life for crimes they committed as juveniles, both are eligible for parole during their 25th year of incarceration.

Although we deemed the claims moot, we credited Castaneda and Jaime's assertion that the court had not mentioned any of the *Miller* factors or Castaneda and Jaime's individual circumstances. We concluded, however, that the court's failure to apply the *Miller* factors did not matter because the cruel and unusual punishments claims were moot in light of section 3051. We also concluded that the record developed at sentencing regarding Castaneda and Jaime's youthful characteristics obviated any concerns they might lack an effective opportunity to develop such a record in the future. Pursuant to our duty to ensure that Castaneda and Jaime's sentences were constitutional at the time they were rendered (see *People v. Caballero* (2012) 55 Cal.4th 262, 268), we deemed it necessary to order that the sentences be modified to reflect a minimum parole eligibility date of 25 years.

Franklin validated our conclusion that Castaneda and Jaime's claims of cruel and unusual punishment were mooted by section 3051. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) Senate Bill No. 260 also required the Board, in conducting a youth offender parole hearing, to "'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and

increased maturity of the prisoner in accordance with relevant case law.'" (*Franklin*, at p. 277, quoting § 4801, subd. (c).)

Section 3051 did not "envision that the original sentences of eligible youth offenders would be vacated and that new sentences would be imposed to reflect parole eligibility during the 15th, 20th, or 25th year of incarceration." (*Franklin*, *supra*, 63 Cal.4th at p. 278.) "But section 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required." (*Id.* at pp. 278-279.) "[T]he combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that [the defendant] is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because [the defendant] is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here. The Legislature's enactment of Senate Bill No. 260 has rendered moot [the defendant's] challenge to his original sentence under *Miller*." (*Franklin*, *supra*, 63 Cal.4th at pp. 279-280.)

Senate Bill No. 260 also contemplated "that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. For example, section 3051, subdivision (f)(2) provides that '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the

crime . . . may submit statements for review by the board.' Assembling such statements 'about the individual before the crime' is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.)

"In addition, section 3051, subdivision (f)(1) provides that any 'psychological evaluations and risk assessment instruments' used by the Board in assessing growth and maturity 'shall take into consideration . . . any subsequent growth and increased maturity of the individual.' Consideration of 'subsequent growth and increased maturity' implies the availability of information about the offender when he was a juvenile." (*Franklin*, *supra*, 63 Cal.4th at p. 284, quoting § 3051, subd. (f)(1).) At a juvenile's parole eligibility hearing, the Board must give "great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

In *Franklin*, the Supreme Court found it unclear whether the defendant "had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) The defendant was sentenced in 2011, before *Miller* was decided and before the enactment of Senate Bill No. 260. (*Franklin*, *supra*, 63 Cal.4th at p. 282.) The trial court admitted very little material in mitigation because it recognized a lack of discretion in sentencing. (*Id.* at pp. 282-283.) Accordingly, the Supreme Court remanded the matter for a

determination whether the defendant "was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Id.* at p. 284.) The Supreme Court also outlined the procedure to be employed if the trial court determined that the defendant did not have a sufficient opportunity to make such a record.[10]

Castaneda and Jaime were sentenced in 2013, after *Miller* was decided but before the enactment of Senate Bill No. 260. At sentencing, the parties focused on the appropriate length of sentence and whether the court's indicated sentence was constitutional. Given the change in the legal landscape regarding juvenile sentencing, it is unclear whether Castaneda and Jaime "had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) Accordingly, we remand the matter so the trial court can determine whether Castaneda and Jaime were "afforded sufficient opportunity to make a record of information relevant to [their] eventual youth offender parole hearing." (*Ibid.*)

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[10] The court stated: "If the trial court determines that [the defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

In their supplemental brief, the People claim remand is unnecessary because the record reflects that Castaneda and Jaime were given a sufficient opportunity to present any and all relevant information. The People refer to Dr. Galvan's declaration and assert that "Castaneda and Jaime's presentence reports contained a wealth of information" regarding their youthful characteristics. We do not dispute that some information was admitted. Nevertheless, because the focus at the sentencing hearing was on the length of the sentences—and not on developing information pertinent to a future youth offender parole hearing, the statutory authority for which did not then exist—it is unclear whether defendants had sufficient opportunity "to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

The People's citation to *People v. Cornejo* (2016) 3 Cal.App.5th 36, is unavailing. The defendants in that case had the incentive and right to submit character references and other evidence to support mitigating factors that could affect the court's sentencing decision. One defendant offered 23 character reference letters, and the other cited evidence that he had severe mental disabilities, lacked parental support as a child, was sexually abused, and had been homeless. The Court of Appeal recognized this information "will be available at a youth offender parole hearing to facilitate the [Board]'s consideration as to whether or not to grant them release." (*Id.* at pp. 69-70.)

Here, mitigating factors were not relevant because the sentences were statutorily fixed. (See § 190.2, subds. (a)(1), (22).) Castaneda and Jaime, unlike the defendants in Cornejo, thus had no incentive or right to introduce such evidence. Prior

to *Franklin*, it was unsettled whether Castaneda and Jaime's indeterminate sentences were subject to the requirements of *Miller*—indeed, the trial court concluded they were not— and the Supreme Court had yet to announce that persons entitled to a youth offender parole hearing had a present right to place on the record evidence relevant to such a hearing. Under *Franklin*, Castaneda and Jaime are entitled to that opportunity.

XI.

Restitution Fines

Appellants were each ordered to pay a $10,000 restitution fine pursuant to section 1202.4. Appellants claim the court erred in imposing the fines without considering their ability to pay. Appellants forfeited this claim by failing to object below. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.)[11]

In any event, the court did not err. Subdivision (d) of section 1202.4 makes clear that "[a] defendant shall bear the burden of demonstrating his or her inability to pay." "This express statutory command makes sense only if the statute is construed to contain an implied rebuttable presumption, affecting the burden of proof, that a defendant has the ability to pay a restitution fine. . . . The statute thus impliedly presumes a defendant has the ability to pay and expressly places the burden on a defendant to prove lack of ability. Where, as here, a defendant adduces no evidence of inability to pay, the trial court

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11 After Wallace filed his notice of appeal, he filed a motion for reconsideration urging the trial court to strike the fine due to his inability to pay. The court correctly found that the notice of appeal had divested it of jurisdiction over the matter. (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1207.)

should presume ability to pay, as the trial court correctly did here." (*People v. Romero* (1996) 43 Cal.App.4th 440, 448–449.)

XII.

In Camera Hearing Regarding Dismissal of Prospective Juror

During voir dire, the court granted the prosecution's request for an in camera hearing under section 1054.7.[12] After conducting the hearing, the court informed the parties that the hearing "involve[d] . . . a member of the jury, and the court has removed that person from the panel because of a conflict with the district attorney's office." The court declined to provide the prospective juror's identification number. Appellants preserved due process and fair trial objections.

Appellants ask us to review the sealed transcript of the in camera hearing to determine whether the prospective juror was properly excused. We have reviewed the transcript and conclude there was no error.

DISPOSITION

The judgments are affirmed. We remand to the trial court for the limited purpose of determining whether Castaneda and Jaime were afforded a sufficient opportunity to make a record of information that will be relevant to the California Board of Parole Hearings as it fulfills its statutory obligations under sections 3051 and 4801. If the court answers this question in the

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[12] Section 1054.7 provides: "Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ."

negative, it shall allow the parties to make their records as set forth in *Franklin*, *supra*, 63 Cal.4th at page 284.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Rick S. Brown, Judge
Superior Court County of Santa Barbara

Madeline McDowell, under appointment by the Court of Appeal, for Defendant and Appellant Roberto Castaneda.

Diane E. Berley, under appointment by the Court of Appeal for Defendant and Appellant Christopher Jaime.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Gregory Wallace.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Steven D. Mathews, Shawn McGahey Webb, Supervising Deputy Attorneys General, David F. Glassman, and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.